

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 01-0083**  
**Use Tax**  
**Penalty**  
**For Years 1997 & 1998**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Gross Retail and Use Taxes—Business Assets**

**Authority:** IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4

Taxpayer protests the assessment of use tax on assets purchased for the business where allegedly no gross retail tax was paid at the point of purchase.

**II. Penalty—Request for Waiver**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

**STATEMENT OF FACTS**

Taxpayer sells and installs mail boxes at retail. The mail box installations can include a post, mounting board, and newspaper holder, in addition to the mail box itself. During the audit, taxpayer was given ample opportunities to provide documentation to support its claim that no use tax was owed to the Department of Revenue. Taxpayer did not comply. The audit was therefore based on the best information available to the auditor. The Department issued its proposed assessment of use tax liability for the years at issue, and taxpayer protested. The Hearing Officer assigned to the protest also gave taxpayer's representative ample opportunity to provide documents supporting its protest of the proposed assessment of Indiana use tax. Taxpayer's representative did not provide such documentation and has had no further contact since a series of phone calls in the fall of 2002. Taxpayer's representative has not responded to the Department's repeated requests for documents. Additional facts will be added as necessary.

**I. Gross Retail and Use Tax—Business assets**

### **DISCUSSION**

Taxpayer protests the use tax assessment on assets purchased in order to carry out its mail box sales and installation business. As discussed in the Statement of Facts *supra*, taxpayer and its representative have had ample opportunities to provide the necessary documentation supporting the protest of the proposed assessment of Indiana use tax. They have not done so.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a “notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made.” Pursuant to IC § 6-2.5-2-1, a “person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.” *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an “excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction.” An exemption is provided in IC § 6-2.5-3-4 if “the property was acquired in a retail transaction and the state gross retail tax” was paid at the time of purchase. Taxpayers are personally liable for the tax. IC § 6-2.5-3-6. IC § 6-2.5-3-7 provides that a “person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;” therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4. In this case, taxpayer has not rebutted the presumption that it owes the state of Indiana the assessed use tax.

### **FINDING**

Taxpayer’s protest concerning the assessment of use tax on assets purchased for the business is denied.

## **II. Penalty—Request for waiver**

### **DISCUSSION**

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person’s return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana’s tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish

reasonable cause by “demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . .” In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty on the entire assessment is inappropriate in this particular instance.

### **FINDING**

Taxpayer’s protest concerning the proposed assessment of the 10% negligence penalty is denied.

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